

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

JASON LOPEZ’S PLANET EARTH LANDSCAPE, INC.

and

Cases 31-CA-29817
31-CA-30010

LABORERS PACIFIC SOUTHWEST REGIONAL
ORGANIZING COALITION, LABORERS’ INTERNATIONAL
UNION OF NORTH AMERICA

Juan Carlos Ochoa Diaz, Esq.,
for the General Counsel.

Erik Benham,
for the Respondent.

Perfecto Ramirez,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in Santa Maria, California, on March 29, April 18–21, and September 6, 2011. (Tr.¹ 602–610, and 630–659. The Laborers Pacific Southwest Regional Organizing Coalition, Laborers’ International Union of North America (the Charging Party or the Union) filed the initial charge in Case 31–CA–29817 on June 29, 2010,² which was amended subsequently on August 20, and a charge in Case 31–CA–30010 on October 29, which was later amended on December 30, and the Regional Director for Region 31 issued the consolidated complaint (the complaint) on February 28, 2011. The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by laying off employees Rubin Olguin (Olguin) and Omar Mota Garcia (Mota) without notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the layoffs and their effects. The complaint also alleges that by participating in the acts referenced above, the Respondent also violated Section 8(a)(3) and

¹ For ease of reference, testimonial evidence cited herein will be referred to as “Tr.” (Transcript) followed by the page number(s); documentary evidence is referred to either as “GC Exh.” for a General Counsel exhibit, “R. Exh.” for a Respondent exhibit, followed by the exhibit number(s); reference to the General Counsel’s posttrial brief shall be “GC Br.” for the General Counsel’s brief, followed by the applicable page numbers.

² All dates are in 2010, unless otherwise indicated.

(1) when it laid off employees Olguin and Mota because of their Union or protected concerted activities.

5 The complaint further alleges that Respondent violated Section 8(a)(4) and (1) by laying off employee Olguin because he testified at a representation hearing before the Board in Case 31–RC–8811. Finally, the complaint alleges that the Respondent violated Section 8(a)(1) by interrogating employee Olguin, promising him prevailing wage jobs, threatening to close its business, and giving its prounion employees money.

10 As the trial went forward to conclusion, counsel for the Acting General Counsel sought and I granted leave to further amend the complaint to better conform to the evidence presented. (Tr. 30–31, 33–36, 653–657; GC Exhs. 2, 21, and 23.) Applying the Board’s standard set forth in *Folsom Ready Mix, Inc.*, 338 NLRB 1172 fn. 1 (2003), I granted this request, as the proposed
15 amendments did not materially prejudice the Respondent; the amendments involved new factual matters but included much of the same evidence put forth at trial as was required to litigate the matters arising from the original complaint and as such I find that Respondent had adequate time to properly defend the new factual allegations.³

20 Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the Acting General Counsel,⁴ I find the
25 following events occurred in the circumstances described below during the period relevant to these proceedings.

³ Initially, the Acting General Counsel sought and I granted *Bannon Mills*, 146 NLRB 611, 614 fn. 4 633–634 (1964), sanctions for Respondent’s continued failure to produce documents at trial in response to a March 7, 2011 document subpoena. See Tr. 47, 179–180, 267; GC Exh. 3. Later, the Acting General Counsel changed his position and sought leave and I granted a trial continuance for Acting General Counsel to evaluate whether to seek subpoena enforcement at the district court. Tr. 355–360, 492–495, 508, 593–594, 624–625. Finally, the Acting General Counsel determined that district court enforcement was unnecessary and moved for a trial resumption which I granted without timely opposition. GC Exh. 22.

⁴ At the close of hearing, all parties were provided the opportunity to submit a closing brief with the announced filing deadline of Friday, October 7, 2011. Neither the Charging Party nor the Respondent timely filed closing briefs. See Tr. 657–659.

On the entire record,⁵ including my observation of the demeanor of the witnesses, and after considering the brief filed on October 7, 2011, by the Acting General Counsel for the reasons set forth below I find that Respondent violated the Act as alleged.

Findings of Fact

I. Jurisdiction

The Respondent is a California corporation with offices and activities in Nipomo, California, with projects throughout Santa Barbara County, California. The Respondent is engaged in the business of commercial and residential landscaping services for governmental and nongovernmental customers who pay either a prevailing wage or a non-prevailing wage depending on the project. The parties stipulated and I find that during the 12-month period ending June 10, the Respondent in conducting its business operations, provided services valued at \$14,880 for Hensel-Phelps Construction Co. at its construction project at the Vandenburg Air Force Base, a base of the United States Air Force, located in the State of California. (Tr. 508, 510.)

II. Alleged Unfair Labor Practices

A. Background

As stated above, the Respondent, a California corporation, is engaged in the business of landscape contracting providing commercial and residential landscaping services in and around northern Santa Barbara County, California, with its business located in Nipomo, California. (Tr. 20, 58–60; GC Exhs. 4 and 11 at 2.) Respondent is owned by Jason Lopez (Owner Lopez) who also acts as the Respondent’s president with the added final authority to hire, fire, and layoff the Respondent’s employees. Id. Owner Lopez’ brother, Martin Lopez (MLopez), also has the authority to direct the Respondent’s employees’ work activities and hire employees at the Respondent. (Tr. 82, 192–193, 522–523.) Owner Lopez admitted that MLopez is the Respondent’s supervisor. (Tr. 523.) The Respondent is a member of, or participates in, an association or other employer group known as the Landscape & Irrigation Joint Journeymen & Apprentice Training Committee of Southern California that engages in collective bargaining. (GC Exhs. 4, 10, and 11 at 2.)

From June 10, 2009 to June 10, Respondent performed work at Allan Hancock College, Vandenberg Air Force Base, and Solvang Elementary School. (Tr. 181.) In conducting its

⁵ I hereby correct the transcript as follows: Tr. 12, L. 24: “to” should be “two”; and Tr. 22, L. 4: “Roberto” should be “Roberta”; Tr. 112, LL. 9–10: “that don’t elicit just a yes, no, or I don’t know response” should be “that elicit just a yes, no, or I don’t know response”; Tr. 125, LL. 12–13: “you can a hold of” should be “you can use to contact me”; Tr. 134, L. 21: “there was some timely filed” should be “it was untimely filed”; Tr. 241, L. 23: “32 and cents” should be \$32 and cents”; Tr. 302, L. 20: “appropriate” should be “inappropriate”; Tr. 307, L. 8: “Q Did you speak English, Mr. Olguin?” should be “MR. BENHAM: Do you speak English, Mr. Olguin?”; Tr. 387, L. 14: “Omar – myself, Omar, and Omar’s brother” should be “another Omar, and his brother”; Tr. 396, L. 6: “Loren” should be “Ruben”; Tr. 403, L. 21: “minuous” should be “minutia”; Tr. 405, L. 22: “as” should be “ask”; Tr. 416, L. 13: “Diaz” should be “Benham”; Tr. 623, L. 8: “rule” should be “overrule.”

business, the Respondent derived at least \$500,000 in gross revenue from the performance of its landscaping services and purchased materials or services directly from outside California valued at \$5000 during the 12-month period ending June 10. (GC Exhs. 4 and 11 at 2.) In addition, during this same time period, the Respondent's gross amount of its purchases from firms which, in turn, purchased those goods directly from outside California equaled or exceeded \$50,000. Id.

Finally, the Respondent employed approximately 18–20 unit individuals during the same relevant time period. (Tr. 121, 465–66; GC Exhs. 4, 11 at 2, and 18.) The following employees of the Respondent (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time landscaping employees employed by the Employer [Respondent] in all counties within the State of California.

Excluded: Confidential employees, secretaries, and supervisors and guards as defined by the Act, as amended.

(GC Exh. 17.)

The unit landscaping employees would perform basic garden and landscaping work for the Respondent that included manual and electric hammer digging, irrigation pipe installation, use of tractors, grass cutting, plant maintenance and planting. (Tr. 193–194.)

B. The January Beginning of the Union Campaign at Respondent

In or about January, the Respondent's employees began to seek representation from the Union in talks with its representative, Perfecto Ramirez, in part because the Respondent was consistently late in paying employees. (Tr. 198–199, 380, 453.) (See also GC Exh. 8.) In addition to later testifying on behalf of the Union at the preelection hearing as stated below, employee Olguin was the leader in the Union's organizing campaign and he regularly helped organize and attend union meetings. (Tr. 200–201, 454.) Employee Mota was also working directly with the Union in the initial organizing drive and he would make telephone calls to the Respondent's employees to inform them of upcoming meetings with union representatives. (Tr. 414, 454.) Specifically, employee Mota spoke to coworkers to convince them to support the Union, and he also helped organize and regularly attended Union meetings. (Tr. 381–382, 454.) After several months of organizing and meetings, in May, the Union filed a representation petition which became Region 31 Case 31–RC–8811. (Tr. 200–202; GC Exhs. 13, 14 and 15.) In addition to organizing employees, the Union regularly deals with employers about wages and rates of pay, vacation benefits, among other things, and employees regularly participate in union meetings and elect union leadership. (Tr. 149–152, 381, 404, 453–454; GC Exh. 10.)

C. The June Representation Hearing

The resulting representation hearing took place over several days in June, including June 17, and employee Olguin testified on behalf of the Union. (Tr. 202–203, 458.) Employee Olguin was previously hired at the Respondent by Owner Lopez in approximately mid-2007. (Tr. 192.) Owner Lopez attended the hearing as well, including June 17, and saw employee Olguin

attend the hearing and testify on behalf of the Union. (Tr. 63–64, 70, 202–203; GC Exh. 5 at 44, 246.)

5 On or about June 18, Owner Lopez spoke to employee Olguin alone at the beginning of a workday while other employees were milling around the Respondent’s yard. (Tr. 64–65, 67, 70, and 203–204, 292.) Employee Olguin understands most English statements but speaks only patchy English as well while Owner Lopez speaks a little bit of Spanish and admits that he roughly is able to communicate with employee Olguin. (Tr. 81, 117, 204–205, 207–208.)
 10 Speaking in both English and Spanish, Owner Lopez asked Olguin if he knew what the Union was. (Tr. 204–205.) Olguin responded that he was aware of the benefits a union can provide. (Tr. 205.) Owner Lopez then told Olguin that Olguin did not know what the Union was and offered him prevailing wage jobs,⁶ “[I]f [Olguin] want[s] more money or if [he] want[s] prevailing work, just tell me.” (Tr. 205, 292, 296.) Owner Lopez further offered Olguin prevailing wage work at a
 15 military base if he wanted them and Owner Lopez admitted to Olguin that Owner Lopez did not want a unionized workforce at the Respondent. Id. Olguin responded by telling Owner Lopez that he would think about it and the conversation turned to work matters. (Tr. 206.)

20 Next, employee Olguin gave Owner Lopez a receipt to be reimbursed for \$20 that Olguin had spent on gas for work. (Tr. 206.) Owner Lopez’ response to this was give employee Olguin \$100⁷ and Owner Lopez told him to buy 6 quarts of oil and to use the rest of the money to buy lunch for employee Olguin and two other coworkers. (Tr. 206, 296, 316.) Prior to this occasion, Owner Lopez had never given employee Olguin extra money beyond expense reimbursements. (Tr. 207.) Owner Lopez then told Olguin: “Think about it. If I want, I can close down the
 25 company [the Respondent] and I [can] open it again the day after tomorrow with a different name. What are the people going to do?” (Tr. 207.)

30 On July 13, Owner Lopez, as the Respondent’s president, signed a Project Agreement for “newly signed employers” with the local Union which acknowledges the July 13 collective-bargaining agreement between the Respondent and the Union. (Tr. 152–153; GC Exhs. 9 and 10.) The project was limited to a project between the Respondent and Contractor Hensel-Phelps located at Vandenberg Air Force Base but during the time period that the Respondent worked the project, the project labor agreement incorporates, and the parties agree to be bound by the collective-bargaining agreement of the International Union. (Tr. 153, 162–165, 177; GC Exhs. 9
 35 and 10.)

Subsequently, the Regional Director issued a Decision and Direction of Election on August 18. (GC Exh. 12.)

⁶ As credibly explained by employee Olguin, prevailing wage jobs are government jobs that pay approximately \$30 per hour more than other projects at Respondent. Tr. 194, 205–206.

⁷ There is conflicting testimony as Owner Lopez testified that he gave employee Olguin \$200 while employee Olguin convincingly testified with no pause that he received a \$100 bill from Owner Lopez on June 18. Tr. 70–71, 206, 573; GC Exh. 5 at 251. As referenced below, employee Olguin was by far the more credible witness than Owner Lopez and I credit employee Olguin’s testimony over Owner Lopez.

D. The September Union Election

On the morning of September 17, the Board's Region 31 conducted the election in its Case 31–RC–8811 at the Respondent's facility yard in Nipomo, California. (Tr. 83, 197, 213, 324–326, 425.) As the election was under way, while approximately 12 employees were gathered outside of the Respondent's area housing the ballots, employee Mota arrived and met with his coworkers to encourage them to vote in the presence of Owner Lopez who was seated in his truck approximately 15 feet away from the employees and observed Mota meet with his coworkers. (Tr. 382–383, 511–512.) Mota handed out coffee and donuts to his coworkers. (Tr. 382.) After talking to his coworkers, employee Mota led them into the Respondent's adjacent construction yard area to vote while Owner Lopez watched from a short distance. (Tr. 324–326, 385, 511–512.) Employees Mota and Olguin voted on September 17 with the other employees and Olguin also acted as the union election observer by the polling place though he could not actually see the area outside of the yard, including the parking lot or inside the Respondent's office during the election. (Tr. 210, 214, 272, 329, 384–385.)

Once the polls closed, the Board agent in charge of the election conducted the vote count and announced, in the presence of the Respondent's representative, Erik Benham,⁸ that the votes cast were 9–8 in favor of the Union, with 3 determinative challenges pending. (Tr. 214, 345, 461; GC Exh. 16.)

E. The Discharges of Employees Mota and Olguin

Later in the afternoon on Friday, September 17, after the election had been completed, the Respondent laid off and fired employee Mota who had worked for the Respondent as a landscaper since 2008. (Tr. 213, 377, 387, 443; GC Exh. 19.) At that time, the Respondent also laid off two other employees. (Tr. 473.) Owner Lopez admits that he was aware of employee Olguin's union activity during the preceding months. (GC Exh. 7.) Although the Respondent has asserted that the reason for the layoff was lack of work, the termination letters dated September 17 also states this, Owner Lopez also admits to employee Mota that Owner Lopez' belief that employee Mota, another employee named Omar, and the second Omar's brother—the three of them—had filed a “complaint” with the Union was one reason for his layoff. (Tr. 86,

⁸ As stated above, Benham also participated at trial as the Respondent's nonattorney representative on behalf of the Respondent and its president, Owner Lopez, though he did not comply with my March 31, 2011 order that he file a written Notice of Representation with the Division of Judges “as soon as possible.” Tr. 8, 77–78, 171. Moreover, I find that the Respondent was not proceeding at trial in pro se as the Respondent selected Benham as its nonattorney representative and had ample time and opportunity since the original June charge to secure a different representative. Tr. 171, 319–320. The NLRB has jurisdiction to proceed against the corporate Respondent here, though it was not represented at the administrative hearing by an attorney but by its nonattorney representatives. See Secs. 102.21, 102.38, and 102.177 of the Board's Rules and Regulations (“... attorney or nonattorney representative of record . . .” and any party can appear at hearing “in person, by counsel, or by other representative, . . .”). See also *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Board*, 99 Cal.App.4th 1094, 1103 (2002) (California administrative agency had jurisdiction over corporate licensee despite licensee not being represented by an attorney at administrative hearing).. Here where more than a year has passed from the filing of the initial charge, I find that the Respondent had ample time and ability to retain legal counsel by the close of trial. See *Patrician Assisted Living Facility*, 339 NLRB 1153 fn. 3 (2003).

387–388, 428–430, 576, 579–581; GC Exhs. 7 and 19.) In addition, Mota credibly explained that the house project in Nipomo that he was working when he was laid off had another 2 months to go to complete the installation of sidewalks and irrigation pipes. (Tr 385–386.) Mota also
 5 described a number of the Respondent’s ongoing projects at the time of his layoff including projects at Vandenberg Air Force Base, one on Broadway in Santa Maria, one in Santa Barbara, one at a school in Solvang, and one on Route 46. (Tr. 388–389.)

On Monday, September 20, the next business day after the election, Owner Lopez laid off
 10 employee Olguin allegedly because there was no work. (Tr. 86, 214–215, 330, 576, 579–581; GC Exhs. 7 and 20.) At trial, the Respondent argued that employee Olguin was laid off because he did not have a valid driver’s license despite being informed by employee Olguin in December 2009 that he did not have a valid driver’s license. (Tr. 298–301, 361–362, 522.) No mention of any failure on Olguin’s part to have a valid driver’s license was included in his lay off letter. (GC
 15 Exh. 20.)

Up until that time, employee Olguin had worked for the Respondent more than 2 years. (Tr. 118, 192.) Since February 1 and continuing until his layoff on September 20, employee Olguin worked at the Respondent with the gardeners or maintenance crew. (Tr. 216, 242.)
 20 Before that time, Olguin worked full time for the Respondent on prevailing wage jobs. (Tr. 245.) Employee Olguin estimated that he regularly worked 50 to 52 hours per week for the Respondent and averaged \$700 per week in earnings for most regular work and almost \$2000 per week when he worked on a prevailing wage government jobs for the Respondent. (Tr. 194, 205–206, 216.) Mota explained that he worked full time averaging between 8–10 hours per day depending on the
 25 type of work and he was similarly paid \$8 per hour for “regular” landscaping work and up to \$30 per hour for “government jobs” (Tr. 378, 420.)

Owner Lopez admitted that he did not notify the Union prior to laying off employees Mota and Olguin. (Tr. 87, 152, 463–464.) Owner Lopez further admits that there have been times
 30 when he would rehire former employees after they had been fired or laid off. (Tr. 87.)

Within a month of his layoff, employee Mota went to speak with Owner Lopez at the Respondent’s facility to ask if he could return to work. (Tr. 390–391.) When Mota asked Owner Lopez if he was going to give Mota work, Owner Lopez began to laugh and told employee Mota
 35 that there was no way he would do so because employees Mota and Olguin had filed a “complaint.” (Tr. 391.) Employee Olguin also spoke to Owner Lopez after his layoff. (Tr. 218.) Owner Lopez told employee Olguin at that time approximately 9 a.m. at a jobsite that everyone from the Union were good-for-nothing assholes who simply wanted employee Olguin’s money. (Tr. 219–220.)
 40

At the time of the layoffs, the amount of work at the Respondent had not changed. At that time, the Respondent was working on numerous projects, and employee Mota was working 8-hour days, just as he had throughout his employment with the Respondent. (Tr. 378, 388–389.) Similarly, at the time of his layoff, employee Olguin was working in the gardening maintenance
 45 crew and the amount of work on that crew had not changed; in fact, employee Olguin was working the same number of hours he had always worked for the Respondent. (Tr. 194, 216.) Employee Olguin had previously stopped driving the Respondent’s truck as its regular driver

Mario who left in protest of nonpayment of wages in May had returned on August 26 or 27. (Tr. 296–298, 346–347.)

Moreover, by October, only a month after laying off employees Mota and Olguin, the Respondent hired three new employees who were identified by employee Mota as wearing the Respondent's yellow company shirts and even Owner Lopez acknowledged that one new employee was working for the Respondent after the layoffs.⁹ (Tr. 90, 217–218, 389–391, 464–466, 470, and 587; GC Exhs. 8 and 18.) By December, at least two of the Respondent's employees, Venegas and Estrada, signed a December 10 letter to the Respondent complaining of nonpayment of wages. (GC Exh. 8.) These two respondent employees were not listed on the *Excelsior* list submitted in August listing the Respondent active employees eligible to vote in the September election. (Tr. 465; GC Exhs 8 and 18.) Owner Lopez testified that his brother, MLopez, hired these two employees at the Respondent. (Tr. 549.) At no time before trial had the Respondent called employee Olguin back to work. (Tr. 217.)

After the election, the challenged ballots were resolved and on November 10, the Regional Director for Region 31 certified the International Union as the exclusive bargaining representation of the unit. (Tr. 345, 462–463; GC Exh. 17.) No timely objections to the certification were filed by the Respondents. Id.

III. Discussion and Analysis

A. Credibility

The key aspects of my factual findings above with respect to the Respondent's engaging in commerce through its generation of revenues and expenses, Owner Lopez' and MLopez' true supervisory roles with the Respondent, the interrogation, threats and promises of prevailing wage jobs and money, and the underlying reasons which led to the discharge of employees Mota and Olguin incorporate the credibility determinations I have made after carefully considering the record in its entirety. The testimony concerning the material events in 2010 contain sharp conflicts. Evidence contradicting the findings, particularly testimony from Owner Lopez, has been considered and rejected for the reasons that follow.

My credibility resolutions have been formed by my consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; and witness demeanor while testifying. More detailed discussions of specific credibility resolutions appear herein in those situations that I perceived to be of particular significance.

⁹ Owner Lopez denied hiring any new workers after the election and the firing of employees Olguin and Mota. Tr. 88. I reject this testimony as not credible and inconsistent with the letter from employees showing three new employees since September 20 who signed a December 10 letter stating that unless they get paid in full, they will not come back to work with the Respondent. Tr. 89; GC Exh. 8.

Employee Olguin's demeanor at trial was impressive. He had worked with the Respondent's president, Owner Lopez, for over almost 3 years before being laid off on September 20. Olguin's chronology of events and detailed recollection were quite credible especially when verified numerous times by Mota, Ramirez, and even infrequently by Owner Lopez. He was especially believable when he discussed his conversation with Owner Lopez on June 18 and recalled both Owner Lopez' statements and his own responses.

Employees Mota and Olguin were also credible witnesses as they were earnest, genuine, and their testimonies were reasonable and consistent with the record. In addition, they appeared serious and respectful of the hearing process. In contrast, Owner Lopez either seemed unable to appreciate the seriousness of the hearing process, or did not care to directly answer questions posed to him and was very evasive and unbelievable except when consistent with Olguin's or Mota's testimony. Employee Olguin was especially credible as he explained how he knew that the Respondent had hired new employees other than him after his layoff because over the years that he worked at the Respondent, he got to know all the workers and he recognized the new employees hired by the Respondent since his layoff. (Tr. 218.)

Ramirez from the Union provided a convincing explanation that at least two employees working for the Respondent in December, Jose Luis Venegas, Jr. and Donato Estrada were not listed on the *Excelsior* list of the Respondent's employees eligible to vote at the September election. (Tr. 464-466, 587; GC Exhs. 8 and 18.) I reject Owner Lopez' contrary testimony (Tr. 88) though he did admit that his brother M Lopez hired Venegas and Estrada at the Respondent. (Tr. 548-550, 587.) Furthermore, the Respondent's other employees were not under the control of the Acting General Counsel and the failure to call any such witnesses should not affect the credibility of employees Olguin's and Mota's testimony.

As stated above, I found key elements of the testimony given by the Respondent's principal witness, Owner Lopez, that conflict with the testimony of employee witnesses unworthy of belief especially when the testimony contradicts his earlier testimony from the representation hearing or other documentary evidence. In virtually all of the significant instances, reliable documentary evidence failed to support accounts provided by the Respondent's key witness.

Owner Lopez' testimony was also marked by an effort to recant prior signed admissions that the Respondent met the Board's commerce requirements in the form of signed commerce questionnaires tendered to the Region on or about June 10 (GC Exh. 4). His behavior at the hearing was marked by a continued refusal to produce subpoenaed documents (with the exception of one single project contract), and a refusal to tender other subpoenaed materials although he was directed to do so. I did not find Owner Lopez credible given his demeanor at trial and his disrespect for the trial process. Therefore, I reject his testimony except for the noted admissions referenced above. Similarly, his testimony was marked by what could only be an intentional failure to recall answers to questions, and a complete refusal to answer other questions although he was directed to do so. Owner Lopez denied the Respondent engaged in commerce within the meaning of the Act. Based upon the submitted evidence, noting Owner Lopez' refusal to answer certain questions, and to supply certain subpoenaed records, I have concluded the Respondent in fact is an employer in commerce meeting the Board's requirements

as set forth above. My conclusion that the Respondent is an employer in commerce will be further discussed in the analysis section of this decision.

Owner Lopez was also not credible that he spoke to employee Olguin about having a valid driver's license on September 15 and that this allegedly was the first time he ever heard that employee Olguin did not have a valid driver's license. (Tr. 520–522.) Also it is not credible that Owner Lopez laid off Olguin for not having a valid driver's license as the September 19 termination letter makes no legitimate reference to Olguin not having a driver's license. (Tr. 522, 569; GC Exh. 20.) It is more credible that this shifted theory for laying off employee Olguin was first developed at trial by the Respondent's representative, Benham, and not considered before April 2011. Furthermore, at the time of his layoff, Olguin was no longer responsible for driving the Respondent's truck. (Tr. 575, 588.) I also reject Owner Lopez' self-serving testimony that his brother, M Lopez, made a list of four or five of the Respondent's employees to fire during the week of September 17 or that the Respondent had too many employees to begin with since the list was not produced and M Lopez did not testify. (Tr. 522–523, 526.)

B. At All Material Times, the Respondent was an Employer Engaged in Commerce within the Meaning of Section 2(2), (6), and (7) of the Act

The Acting General Counsel alleges in paragraphs 2 and 3 of the complaint that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent, however, refused to admit that at all material times, it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Tr. 19.)

As stated above, though, as admitted in the Questionnaire on Commerce Information admittedly signed by Owner Lopez on June 10, I find that in conducting its business in Nipomo, California, for residential and commercial customers as a California corporation, the Respondent derived at least \$500,000 in gross revenue from the performance of its retail and wholesale landscaping services and purchased materials or services directly from outside California valued at \$5000 during the 12-month period ending June 10. (Tr. 62; GC Exhs. 4 and 11 at 2.) The Respondent did not deny signing the commerce information questionnaire on June 10 nor was any credible evidence put forth to dispute the accuracy of the information provided within the questionnaire. I find that the Acting General Counsel has put forth evidence sufficient to show that the Respondent's gross revenues satisfy the Board's retail standard. See *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958).

In addition, during this same time period, the Respondent's gross amount of its purchases from firms which, in turn, purchased those goods directly from outside California equaled or exceeded \$50,000. *Id.* Alternatively, the Respondent's purchase of materials or services directly from outside California valued at \$5000 during the same 12-month period, also admitted in the same questionnaire, is sufficient to establish statutory jurisdiction. (GC Exhs. 4 and 11 at 2.) See also *Pioneer Concrete Co.*, 241 NLRB 264, 265 (1979), *enfd.* 637 F.2d 698 (9th Cir. 1981). Finally, the Respondent employed approximately 18 individuals during the same relevant time period. (Tr. 465–466; GC Exhs. 4, 11 at 2, and 18.)

Thus, I agree with the Acting General Counsel's argument. (GC Br. at 8–9.)
 Consequently, I find that at all material times, the Respondent was an employer engaged in
 commerce within the meaning of Section 2(2), (6), and (7) of the Act as alleged in paragraphs 2
 and 3 of the complaint.

*C. At All Material Time, the Union was a Labor Organization within the Meaning of
 Section 2(5) of the Act*

The Acting General Counsel alleges in paragraph 4 of the complaint that at all material
 times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.
 The Respondent, once again, refused to admit that the Union is a labor organization within the
 meaning of Section 2(5) of the Act. (Tr. 19.) However, based on the undisputed testimony of
 Angelo Arevalos, a 28-year union representative and the local Union's vice president and
 business agent, I find that the Union is a labor organization within the meaning of Section 2(5) of
 the Act which regularly deals with employers about wages and rates of pay, and whose
 employees regularly participate in union meetings and elect union leadership. (Tr. 148–178,
 452–490; GC Exh. 10.) Moreover, on November 10, the Union was certified by the Board in a
 representation proceeding involving this Respondent's business. (Tr. 345, 462–463; GC Exh.
 17.)

As a result, I further find that at all material times, the Union was a labor organization
 within the meaning of Section 2(5) of the Act as alleged in paragraph 4 of the complaint.¹⁰

D. Supervisory Status of Owner Lopez and Supervisor/Agent Status for MLopez

Despite its admission that Owner Lopez, the Respondent's owner and president, has final
 authority to hire, fire, and lay off the Respondent's employees, the Respondent challenges the
 supervisor and agent status for Owner Lopez. (See Tr. 19, 60.) Similarly, despite the
 Respondent's admission through its president, Owner Lopez, that his brother, MLopez, is a
 supervisor who is in charge and hires employees, the Respondent also refused to stipulate to the
 supervisor and agent status for MLopez. (See Tr. 19, 60, 523.)

Under Section 2(11) of the Act a supervisor is any person:

Having authority, in the interest of the employer, to hire, transfer, suspend, lay
 off, recall, promote, discharge, assign, reward, or discipline other employees, or
 responsibility to direct them, or to adjust their grievances, or effectively to

¹⁰ The Regional Director also found that the Union was a labor organization in his decision in the R-
 case. GC Exh. 12 at 3–6. The Respondent did not file any timely exceptions to the Regional Director's
 factual findings in his decision. While I do not rely on the Regional Director's decision, I take
 administrative notice of it and I note that the Respondent did not offer any new reliable evidence proving
 that the Regional Director's factual findings were incorrect. Tr. 188. No convincing arguments or
 supplemental reliable evidence have been proffered by the Respondent in this case to dispute the Union's
 labor organization status.

recommend such action, if such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

5 29 U.S.C. § 152(11).

Each of these criteria need not be satisfied for an employee to be classified as supervisor under Section 2(11). *National Welders Supply Co.*, 129 NLRB 514 (1960). Moreover, the Supreme Court has suggested that an employee may be classified as a supervisor if he meets any
 10 1 of the 12 criteria. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). However, to be classified as a supervisor the employee must (1) have authority, (2) to use independent judgment, (3) in performing such supervisory functions, and (4) in the interest of management. *NLRB v. Healthcare & Retirement Corp of America*, 511 U.S. 571 (1994). However, making routine assignments without the use of independent judgment has been found to be insufficient to meet
 15 the requirements of a statutory supervisor. *Stanford Hotel*, 344 NLRB 558 (2005).

Owner Lopez fits several of the Act's enumerated criteria including having final authority for hiring, laying off, and discharging employees. (See Tr. 19, 60.) The Respondent's written work contracts, termination letters, and other key events such as the Respondent's representative
 20 at the representation hearing all show that Owner Lopez, as the Respondent's owner and president, had full authority to act for the Respondent in all employee and labor matters. (See GC Exhs. 4, 5, 7–9, 11, 19–20.) Employees were directed to contact Owner Lopez or MLopez for any problems or complaints they had related to work.

25 Also, Owner Lopez as evidenced by his June 18 conversation with employee Olguin concerning his offer to provide Olguin and other employees with higher paying prevailing wage jobs shows that Owner Lopez had the ability to directly impact the earning capacity of the landscaper employees by assigning them more or less lucrative jobs.

30 Although the Respondent claims that Owner Lopez does not have any supervisory authority over its employees, it is clear that Owner Lopez is responsible for assigning work and hiring, laying off, and firing employees. It is telling that at the trial in this matter, Owner Lopez suddenly began saying that his brother MLopez was the employees' supervisor and hired employees to create the appearance that he had no authority over the landscape employees
 35 though Owner Lopez refused to stipulate to this fact.

In addition to the primary supervisory status criteria, Owner Lopez also meets many of the secondary criteria the Board has developed including employees' perception that Owner Lopez is a supervisor as well as his direct involvement in employee Olguin's and employee
 40 Mota's lay offs. See *Ken-Crest Services*, 335 NLRB 777, 779 (2001). In addition, Owner Lopez is inextricably linked with management and all of his actions are in the interest of management. Owner Lopez is the namesake, owner, founder, and president of the business.

45 Despite the Respondent's claims that Owner Lopez did not have any authority over the employees, it is clear that he did have actual control and authority over the landscape employees and that he directly supervised them. The record is rife with examples of how Owner Lopez exerted that control and as such, I find that Owner Lopez is a supervisor within the meaning of

Section 2(11) because he is admittedly vested with final authority to hire, lay off, and fire the Respondent's employees, assign and direct their work, and discipline them.

I further find that Owner Lopez' brother, MLopez, is also a supervisor at the Respondent under Section 2(11) of the Act, because admittedly by Owner Lopez, MLopez is a supervisor who is also in charge and hires employees as their supervisor. (Tr. 523.) Consequently, I find that Owner Lopez and MLopez are supervisors within the meaning of Section 2(11) of the Act.

E. Respondent Violated Section 8(a)(5) and (1) of the Act by Laying Off Employees Olguin and Mota Without Prior Notice to the Union and Without Affording the Union an Opportunity to Bargain with the Respondent

The Acting General Counsel alleges in paragraphs 6 and 10 of the complaint that, on September 17 later in the day after the representation election for employee Mota, and on September 20 for employee Olguin, the Respondent laid them off without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct in violation of Section 8(a)(5) and (1) of the Act. As I found above, Owner Lopez admitted and the union representatives confirmed that the Respondent did not notify the Union prior to laying off employees Mota and Olguin. (Tr. 87, 152, 463–464.) Therefore, I further find that Owner Lopez did not bargain with the Union prior to laying off employees Mota and Olguin.

The complaint alleges, and the evidence submitted supports, that on September 17, a representation election was conducted among employees in the unit and on November 10, the Union was certified as the exclusive collective-bargaining representative of the unit. (Tr. 83, 197, 213–214, 324–326, 345, 425, 461–463; GC Exhs. 16 and 17.) Thus, the layoffs on employees Mota and Olguin took place between the election and the certification of the Union. The Board has held in *Consolidated Printers*, 305 NLRB 1061, 1067 (1992), that no unilateral changes may be made by an employer during the period of time between the results of the election and eventual certification. Accord, *Ebenezer Rail Car Services*, 333 NLRB 167 (2001). Here, there is no question that a change in conditions of employment took place on September 17 after the representation election and again on September 20 for employees Mota and Olguin, when they were unilaterally laid off.

I also rely on the following well-established principles. Section 8(a)(5) and (d) of the Act obligate an employer to bargain with the representation of its employees in good faith with respect to “wages, hours and other terms and conditions of employment.” *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *Fiberboard Corp. v. NLRB*, 379 U.S. 203, 210 (1964). Section 8(a)(5) also obligates an employer to notify and consult with a union concerning changes in terms and conditions of employment before imposing such changes. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). When a majority of the unit employees have selected the union as their representative in a Board-conducted election, the obligation to bargain, at least with respect to changes in terms and conditions of employment, commences *not* on the date of certification, but *as of the date of the election*. *Alta Vista Regional Hospital*, 357 NLRB No. 36, slip op. at 2 (2011). Accord, *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). The Board explained in *Mike O'Connor Chevrolet*, *supra*,

The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes. Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representation of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending.

(Id. at 703 (footnotes omitted).)

The Respondent's stated position at trial was that because the election was not certified until November and because the 9–8 vote in favor of the Union on September 17 included 3 challenged ballots, the Respondent “was not bound by the union because there was no determination on that day [September 17] . . . there was no winning . . . [so Respondent] who has employees at will who he [Respondent] can layoff, fire, do basically whatever he wants” without any risk of being subject to the Act. (Tr. 344–345, 374–375.) As shown above, however, this position is contrary to Board law as referenced above. See also *Whitewood Maintenance Co.*, 292 NLRB 1159, 1211 (1989), *enfd. sub nom. Texas World Service Co. v. NLRB*, 928 F.2d 1426 (5th Cir. 1991). Moreover, the Respondent admits that it did not notify the Union prior to laying off employees Mota and Olguin and that it did not bargain with the Union prior to laying off employees Mota and Olguin.

The record contains only the Respondent's self-serving and conclusory statements that because there was no work the changes were necessitated by compelling economic considerations. No evidence was submitted, however, showing extraordinary, unforeseen events occurring that had a major economic effect on the Respondent. As stated above, this evidence is contradicted by other evidence and no evidence was presented showing that the Respondent made its decision to fire Olguin and Mota before the union election. Thus, I find that: (1) the Respondent's shifting reasons for laying off employee Olguin; (2) the Respondent's hiring new employees soon after the layoffs and its not offering employees Olguin and Mota their jobs back before hiring new workers; (3) Olguin's and Mota's credible testimony that at the time of their layoffs their amount of work and work hours remained unchanged; and (4) the Respondent's incorrect application of current Board law repudiates its unsupported argument that there were compelling economic reasons for their employees' layoffs. In so doing, the Respondent assumed the risk. Because the final determination in the representation proceeding

resulted in the certification of the Union, the Respondent violated Section 8(a)(5) and (1) of the Act by its unilateral actions referred to above.

5 *F. Discriminatory Treatment of Discharged Union Employees*

Motive-based allegations of discrimination are decided under the framework of the Board's *Wright Line* decision.¹¹ Discharge because of an employee's membership in or activities on behalf of a labor organization violates Section 8(a)(3). The General Counsel's initial burden
10 under *Wright Line* is to show that the alleged discriminatee's protected conduct was a motivating factor in the discharge. The elements commonly required to support such a showing are union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. See, e.g., *Austal USA, LLC*, 356 NLRB No. 65 (2010); *Willamette Industries*, 341 NLRB 560, 562 (2004). The timing of the discharge in relation to the
15 alleged protected conduct may also be relevant. See, e.g., *Best Plumbing Supply*, 310 NLRB 143 (1993); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

Generally, the Acting General Counsel relies on evidence¹² such as the timing of the employer's action,¹³ pretextual motives,¹⁴ inconsistent treatment of employees,¹⁵ and shifting
20 explanations provided by the employer.¹⁶ *Flour Daniel, Inc.*, 311 NLRB 498 (1993). "Since motive is critical to a finding of an 8(a)(3) violation, but since direct evidence of motive is rare, one must look to all of the attendant circumstances to determine whether the Respondent acted improperly or not." *Keller Mfg. Co.*, 237 NLRB 712, 734 (1978). See also *Atlantic Metal Products, Inc.*, 161 NLRB 919, 922 (1966). Moreover, where the employer's "given reason for
25 termination is implausible, then that fact tends to prove an attempt to disguise the true, and unlawful, motive." *Keller Mfg. Co.*, citing *Capital Records, Inc.*, 232 NLRB 228 (1977). See also *J. S. Troup Electric*, 344 NLRB 1009 (2005) (Board will infer an unlawful motive if the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of
30 unlawful motive").

¹¹ *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

¹² See also *Asociacion Hospital Del Maestro*, 291 NLRB 198 (1988) (finding that the employee's union activities were widespread and known to the employer and that there was companywide union animus); *White-Evans Service Co.*, 285 NLRB 81 (1987) (animus found where employer fired two of the most outspoken union supporters and refused to rehire them even though they continued seeking employees).

¹³ *Bay State Ambulance Rental*, 280 NLRB 1079 (1986).

¹⁴ *Abbey Island Park Manor*, 267 NLRB 163 (1983).

¹⁵ *Carpenters Health & Welfare Fund*, 327 NLRB 262 (1998).

¹⁶ *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263 (7th Cir. 1987).

Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, as noted even without direct evidence. Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct,¹⁷ departures from past practices, tolerance of behavior for which the alleged discriminatee was fired, disparate treatment of the discharged employees, and reassignments of a prounion from former duties isolating the employee, all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Bourne Manor Extended Health Care Facility*, 332 NLRB 72 (2000); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *In-Terminal Services Corp.*, 309 NLRB 23 (1992); *Nortech Waste*, 336 NLRB 554 (2001); *Bonta Catalog Group*, 342 NLRB 1311 (2004); *L.S.F. Transportation, Inc.* 330 NLRB 1054 (2000); and *Medric One, Inc.*, 331 NLRB 464 (2000).

Once the General Counsel makes a showing of discriminatory motivation, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). In other words, under *Wright Line*,

an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employ, but must show by a preponderance of the evidence that the action would have taken place even with the protected conduct.

North Carolina License Plate Agency #18, 346 NLRB 293, 294 (2006). If the evidence produced by the employer is found to be pretextual, the inference of wrongful motive established by the Acting General Counsel is left intact. *Frank Black Mechanical Services*, 271 NLRB 1302 (1984); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). In short, a finding of pretext defeats any attempt by the employer to show that it would have discharged the discriminatee absent his or her (protected) union activities. *Golden State Foods Corp.*, 340 NLRB 382 (2003).

1. Olguin's layoff violated Section 8(a)(3) and (1)

The Acting General Counsel alleges in paragraphs 7 and 11 of the complaint that, on September 20 after the representation election for employee Olguin, the Respondent laid him off which is a form of discrimination in regard to the hire or tenure or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act. As such, the Acting General Counsel asserts that Olguin was terminated for engaging in union and protected concerted activities and that the Respondent's action violated Section 8(a)(3) and (1). The *Wright Line* burden-shifting analysis set forth above is applicable to Olguin's termination. Therefore, the Acting General Counsel must establish that

¹⁷ The Board advises that the investigation should be full and fair. The Board has also noted, however, that while an employer's failure to conduct a full and fair investigation into alleged misconduct of an employee may constitute evidence of discriminatory intent, such failure will not always constitute evidence of such intent. *Hewlett Packard Co.*, 341 NLRB 492 (2004).

Olguin was engaged in protected conduct, that the Respondent knew about his protected conduct and that union animus was a motivating factor in the Respondent's decision to terminate Olguin.

On this record, the Acting General Counsel has met his initial burden of proving that the Respondent fired Olguin because he, along with Mota, was a leader in the Union's campaign and because he was subpoenaed to testify in a Board proceeding in support of the Union's election petition. Olguin clearly engaged in protected concerted activities by testifying at the Board hearing on June 17. Owner Lopez attended the hearing as well, including on June 17, and saw employee Olguin attend the hearing and testify on behalf of the Union. (Tr. 63–64, 70, 202–203; GC Exh. 5 at 44, 246.) As stated above in addition to his testifying on behalf of the Union at the preelection hearing as stated above, employee Olguin was the leader in the Union's organizing campaign and he regularly helped organize and attend union meetings. (Tr. 200–201, 454.)

The Respondent initially argued that Olguin's layoff was due allegedly because there was no work. (Tr. 86, 214–215, 330, 576, 579–581; GC Exhs. 7 and 20.) At trial, the Respondent's argument shifted and became that employee Olguin was laid off because he did not have a valid driver's license despite being alerted by employee Olguin in December 2009 that he did not have a valid driver's license. (Tr. 298–301, 361–362, 522.) Thus, I find that the Acting General Counsel has presented evidence that establishes that the reasons given for the Respondent's layoff of Olguin are pretextual—that is, either false or not in fact relied upon and the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). See also *Rood Trucking Co.*, 342 NLRB 895, 898 (2004).

In addition, the Respondent's animus against the Union is shown by the independent 8(a)(1) violations I have found as described below. Furthermore, there is suspicious timing as Olguin was laid off on the first business day after the Union's successful election on September 17. I find that employee Olguin's sudden September 20 layoff being so close in time to the Union's successful election is further evidence of the Respondent's antiunion animus. Finally, as stated above, when Mota asked Owner Lopez if he was going to give Mota his job back, Owner Lopez began to laugh and told employee Mota that there was no way he would do so because employees Mota and Olguin had filed a union "complaint." (Tr. 391.) Employee Olguin also spoke to Owner Lopez after his layoff. (Tr. 218.) Owner Lopez told employee Olguin at that time at a jobsite that everyone from the Union were good-for-nothing assholes who simply wanted employee Olguin's money. (Tr. 219–220.) In these circumstances, the Acting General Counsel has met his burden of showing improper antiunion animus for the job termination of employee Olguin.

Where, as here, the Acting General Counsel makes a strong showing of discriminatory motivation, the respondent's *Wright Line* defense burden is substantial. *Bally's Atlantic City*, 355 NLRB No. 218, slip. op. at 3 (2010). I find that, on this record, the Respondent has not overcome that substantial burden and persuasively shown that it would have fired Olguin absent his union and protected activities. Also, much of the Respondent's defense is reliant on testimony at trial from Owner Lopez which I have found to be contradictory and noncredible. Consequently, I reject the Respondent's noncredible version of the facts portrayed through Owner Lopez as he was an unreliable witness.

The Respondent has not shown that it would have terminated Olguin in the absence of his union leadership, support and protected concerted activities including his testifying for the Union at the June Board proceeding. Consequently, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off employee Olguin absent his union activity.

2. Mota's layoff violated Section 8(a)(1) and (3)

On this record, the same *Wright-Line* analysis applies to the termination of Mota, as the Acting General Counsel asserts that Mota was also laid off for engaging in protected concerted activities and that the Respondent's action violated Section 8(a)(3) and (1). Like employee Olguin, Owner Lopez viewed employee Mota as one of the union leaders and witnessed Mota's direct assistance to the Union at the union election on September 17. Owner Lopez also had knowledge that employee Mota was working directly with the Union in the initial organizing drive and he would make telephone calls to the Respondent's employees to inform them of upcoming meetings with union representatives. (Tr. 414, 454.) Specifically, employee Mota spoke to coworkers to convince them to support the Union, and he also helped organize and regularly attended union meetings. (Tr. 381–382, 454.)

On September 17, as the election was under way, while employees were gathered outside of the Respondent's work yard area housing the ballots, employee Mota arrived to greet his coworkers to encourage them to vote in the presence of Owner Lopez who was seated in his truck approximately 15 feet away. Owner Lopez observed Mota meet with his coworkers and hand out coffee and donuts to them. (Tr. 382–383, 511–512.) After talking to his coworkers, employee Mota led them into the adjacent construction yard area to vote while Owner Lopez watched from a short distance. (Tr. 324–326, 385, 511–512.) Employee Mota also voted on September 17 with the other employees. (Tr. 210, 214, 272, 329, 384–385.) Mota's protected concerted activity is protected by the Act. As with Olguin, at the time of Mota's layoff on September 17, the Respondent knew of Mota's protected concerted activities in support of the Union. It does not take a leap of faith to tie Mota's termination to the same unlawful treatment from the Respondent that began at the time the Respondent's principal met with Olguin on June 18 and described the threats, interrogation, and promises discussed below that would follow the prounion landscapers Olguin and Mota.

As with Olguin, the Respondent's numerous unfair labor practices demonstrate antiunion animus as does the suspicious timing of the Respondent's layoff in relation to the union election that was directed towards Mota to retaliate against him. Significantly, the Respondent laid off Mota later the same day as the successful election on September 17. Where, as here, the Acting General Counsel makes a strong showing of discriminatory motivation, the respondent's *Wright Line* defense burden is substantial. *Bally's Atlantic City*, 355 NLRB No. 218, slip op. at 3 (2010). I find that, on this record, the Respondent has not overcome that substantial burden and persuasively shown that it would have fired Mota absent his union and protected activity.

The Respondent argues that Mota was justifiably terminated due to a lack of work. At trial, however, neither Owner Lopez nor his brother presented any evidence as Owner Lopez claimed that M Lopez had prepared a list of employees to lay off that included employee Mota

well in advance of the September 17 election. Instead, Owner Lopez fabricated facts that ignored more credible testimony. In addition, Owner Lopez' true animus toward employee Mota came forth, as stated above, when Mota asked Owner Lopez if he was going to give Mota his job back, Owner Lopez began to laugh and told employee Mota that there was no way he would do so because employees Mota and Olguin had filed a union "complaint." (Tr. 391.) In these circumstances, the Acting General Counsel has met his burden of showing improper antiunion animus for the job terminations of employees Olguin and, as discussed below, Mota.

In conclusion, I find that the Respondent has not shown that it would have terminated Mota in the absence of his union leadership and protected concerted activity including his assisting employees at the union election. Consequently, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off employee Mota absent his union activity.

G. The Respondent Violated Section 8(a)(4) and (1) of the Act by Laying Off Employee Olguin Because he Testified at the Representation Hearing in Case 31-RC-8811

The Acting General Counsel alleges in paragraphs 8 and 12 of the complaint that employee Olguin's testimony at the June representation hearing in Case 31-RC-8811 caused the Respondent's September 20 lay off of him in retaliation or discrimination against employees for filing charges or giving testimony under the Act in violation of Section 8(a)(4) and (1) of the Act.

I agree and find that the evidence referenced above shows that the Respondent unlawfully laid off employee Olguin because he testified at the June representation hearing in Case 31-RC-8811. The same *Wright Line* analysis discussed above under Section 8(a)(3) and (1) of the Act for the Respondent's unlawful layoff of employee Olguin because of his union activities also applies to the instant retaliation allegations under Section 8(a)(4) and (1) of the Act. See *Freightway Corp.*, 299 NLRB 531, 532 fn. 4 (1990) (Board applies *Wright Line* analysis exactly the same to alleged 8(a)(4) violations). Moreover, Owner Lopez' animus toward employee Olguin's appearance and testimony on June 17 is further demonstrated by his unlawful acts the very next day after the June 17 representation hearing as discussed below including illegal interrogation, threats, and promises of extra money and prevailing wage jobs. Consequently, I find that the Respondent violated Section 8(a)(4) and (1) of the Act by laying off employee Olguin because he testified at the June representation hearing.

H. Independent 8(a)(1) Violations

The complaint alleges at paragraphs 9 and 13 that the Respondent violated Section 8(a)(1) of the Act at the June 18 meeting between Owner Lopez and employee Olguin when Owner Lopez: (1) interrogated employee Olguin about the his union activities and sympathies; (2) threatened employee Olguin with closing the business if he or his fellow employees selected the Union as their bargaining representative; (3) promised employee Olguin the more lucrative and higher paying prevailing wage jobs to discourage him and his fellow workers' support for the Union; and (4) gave employees money to discourage their support for the Union.

I find that on June 18, Owner Lopez spoke to employee Olguin alone at the beginning of a workday while other employees were milling around the Respondent's yard. Speaking in both English and Spanish, Owner Lopez initiated the conversation topic concerning the Union and asked Olguin if he knew what the Union was. Olguin responded that he was aware of the benefits a union can provide. Owner Lopez then told Olguin that Olguin did not know what the Union was and offered him higher paying prevailing wage jobs, "[I]f [Olguin] want[s] more money or if [he] want[s] prevailing work, just tell me." Later, Owner Lopez said to Olguin: "Think about it. If I want, I can close down the company [the Respondent] and I [can] open it again the day after tomorrow with a different name. What are the people going to do?"

Traditionally, the Board looks to the "totality of the circumstances" in determining whether a supervisor's questions to an employee about his protected activity were an unlawful interrogation under the Act. *Rossmore House*, 269 NLRB 1176 (1984), *affd.* sub nom *UNITE HERE v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Medcare Associates, Inc.*, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as "*Bourne factors*," so named because they were first set forth *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). These factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply. Under this test, either the words themselves, or the context within which they are used, must suggest an element of interference or coercion. *Stabilus, Inc.*, 355 NLRB No. 161, slip op. at 15 (2010).

Based on my factual findings set forth above, I find merit in all of the complaint allegations concerning the June 18 meeting between Owner Lopez and employee Olguin just 1 day after Owner Lopez witnessed Olguin testify on behalf of the Union at the representation hearing and before Olguin would return to testify later that month. (Tr. 64–65, 67, 70, 81, 117, 194, 203–208, 292, 296, and 316.) First of all, the conversation between the two contained, among other things, Owner Lopez' interrogation of employee Olguin as it took place in the context of a hostile conversation as Olguin had not brought up the Union in the conversation prior to Owner Lopez doing so and the conversation evolved to Owner Lopez' unprovoked veiled threat of business closure if employee Olguin continued his support for the Union. See *Hoffman Fuel Co.*, 309 NLRB 327, 327 (1992) (Employer's questioning union supporters of their union sentiments coupled with veiled threats of a business shutdown constitutes unlawful interrogation.). Moreover, I find that Owner Lopez had no legitimate purpose for questioning employee Olguin about the Union and, similar to the facts in *Hoffman Fuel Co.*, the totality of Owner Lopez' conversation with employee Olguin "had a reasonable tendency to restrain or coerce [employee Olguin] in engaging in union activities and therefore constitute[s] a coercive interrogation." *Hoffman Fuel Co.*, 309 NLRB at 327. Under these circumstances, I find that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating Olguin on June 18 about his union activities and sympathies.

Cumulatively, these statements are alleged to unlawfully threaten employee Olguin and other prounion employees with the loss of their employment should they choose the Union as their collective-bargaining agent. The lead case on this subject, and others, is *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), where the Court stated:

An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a “threat of reprisal or force or promise of benefit.” He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities, and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

Owner Lopez threatened the Respondent’s employees that by joining the Union, Olguin and other union landscapers will lose their jobs at the Respondent. In the context of the Respondent’s other contemporaneous unfair practices, it is clear that the job terminations or layoffs would be caused by the Respondent’s reaction to the union campaign and a successful union election. Thus, Owner Lopez’ statement amounted to an unlawful threat of reprisal not made on the basis of objective fact. See *Patsy Bee, Inc.*, 249 NLRB 976, 977 (1980) (Finding violation where employer had no indication from union that it would make demands which would cause economic hardship, let alone plant closure; nor did he have evidence that his customers might even pull their contracts.). Under these circumstances, I further find that the Respondent violated Section 8(a)(1) of the Act by threatening its employees with closing the business on June 18 if they selected the Union as their bargaining representative.

Furthermore, Owner Lopez’ promise to the Respondent’s employees including Olguin on June 18 of higher paying prevailing wage jobs to discourage their support for the Union was violative of Section 8(a)(1) of the Act and constitutes interference with the employee’s Section 7 rights. At that time, Owner Lopez clearly knew of the union activity and the Board hearing the day before with resumption later in the month, and he was intent on defeating the organizing campaign by improperly influencing Olguin with increased benefits in return for him not testifying for the Union later in the month and further supporting the Union at the Respondent.

Finally, consistent with my factual findings set forth above, I further find that Owner Lopez also gave the Respondent’s employees money when he handed employee Olguin \$100 for the first time on June 18 and told him to use the money not only as reimbursement for minor work expenses but to buy Olguin and other respondent employees lunch. I further find that this \$100-money payment was intended at least in part as an inducement to dissuade employee Olguin from continuing to support the Union. See *Bourne Co.*, 144 NLRB 805, 815 (1963) (Employer violates Section 8(a)(1) of the Act by giving money to an employee during a union organizing drive.). Here, too, Owner Lopez’ monetary inducement to employee Olguin and his coworkers is violative of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Owner Lopez and MLopez are supervisors within the meaning of Section 2(11) of the Act.

4. By laying off employees Olguin and Mota on September 17 and 20, 2010, respectively, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. By laying off employees Olguin and Mota on September 17 and 20, 2010, respectively, because they support the Union or engage in protected concerted activities, such as testifying at a representation hearing or assisting employees cast their ballots in support of the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. By laying off Employee Olguin on September 20, 2010 because he testified at a representation hearing before the Board in Case 31-RC-8811, the Respondent violated Section 8(a)(4) and (1) of the Act.

7. Respondent engaged in conduct in violation of Section 8(a)(1) of the Act:

(a) By interrogating employee Olguin about his union membership, sympathies and/or activities on June 18, 2010.

(b) By threatening employee Olguin on June 18, 2010 to close its business if he continued his union organizational activities.

(c) By promising employee Olguin prevailing wage jobs on June 18, 2010 if he refrained from union organizational activities.

(d) By giving employee Olguin and his co-workers money on June 18, 2010 if they refrained from union organizational activities.

8. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The above violations are unfair labor practices within the meaning of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist from engaging in such conduct in the future and to take certain affirmative action designed to effectuate the policies of the Act. To remedy the Respondent's violations of Section 8(a)(1) of the Act, I shall recommend that the Respondent post and abide by the attached notice to employees.

Having found that Respondent unlawfully laid off employees Rubin Olguin and Omar Mota, I shall order it to offer them full and immediate reinstatement to their former jobs, or, if

those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Back
 5 pay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also be required to remove from its files any and all references to the unlawful
 10 lay offs, and to notify employees Olguin and Mota in writing that this has been done and that such adverse actions will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.¹⁸

ORDER

The Respondent, Jason Lopez's Planet Earth Landscape, Inc., of Nipomo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully interrogating employees about their union membership, sympathies and/or activities;

(b) Unlawfully threatening to close their business because their employees engaged in activities on behalf of the Laborers Pacific Southwest Regional Organizing Coalition, Laborers' International Union of North America (the Union), or other protected concerted activities, such as testifying at a representation hearing or assisting fellow employees in the union election process;

(c) Unlawfully promising or granting employee benefits, including more lucrative prevailing wage job assignments, if they abandon their support for the Union;

(d) Unlawfully giving employees money if they refrained from union organizational activities;

(e) Unlawfully laying off employees because they support the Union or engage in protected concerted activities, such as attending a representation hearing or assisting co-workers during a Union election;

(f) Unlawfully in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed to them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this order, offer employees Olguin and Mota immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make employees Olguin and Mota whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this order, remove from its files any reference to the unlawful actions taken against Olguin and Mota and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful employment actions will not be used against them in any way.

(d) Preserve, and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records, if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of this Order, post at its Nipomo, California yard, copies of the attached notice marked "Appendix"¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 18, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

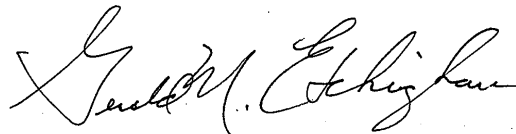
(g) Within 14 days of the date of this order, the Respondent will hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" will be publicly read by the responsible corporate executive, Jason Lopez, president, in both English and Spanish, in the presence of a Board agent, or at Respondent's option, by a Board agent in Mr. Lopez's presence. This remedy is appropriate here because the

¹⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent's violations of the Act are sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. See *Homer D. Bronson Co.*, 349 NLRB 512, 515–516 (2007), *enfd. mem.* 273 Fed.Appx. 32 (2d Cir. 2008).

(h) The Respondent shall provide the Union, upon request within 1 year of issuance of this decision, a list of employees' names and addresses.

Dated: Washington, D.C., December 5, 2011.

A handwritten signature in black ink, appearing to read "Gerald M. Etchingham". The signature is fluid and cursive, with the first name "Gerald" and last name "Etchingham" clearly legible.

Gerald M. Etchingham
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT question you about your union membership, sympathies and/or activities.

WE WILL NOT threaten to lay off, terminate, or otherwise discriminate against you or threaten to close our business because you engage in activities on behalf of the Laborers Pacific Southwest Regional Organizing Coalition, Laborers' International Union of North America (the Union), or other protected concerted activities, such as attending a representation hearing or assisting co-workers during a Union election.

WE WILL NOT promise or grant employee benefits, including more prevailing wage job assignments, if they abandon their support for the Union.

WE WILL NOT lay off, terminate, or otherwise discriminate against you for supporting the Union or engaging in protected concerted activities, such as attending a representation hearing or assisting co-workers during a Union election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, fully reinstate Rubin Olguin Leyva and Omar Mota Garcia to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make them whole for any loss of earnings and other benefits, including interest, suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, rescind the lay offs of Rubin Olguin Leyva and Omar Mota Garcia and expunge any reference to their lay off or termination from all our files and records and WE WILL within 3 days thereafter inform Rubin Olguin Leyva and Omar Mota Garcia in writing that this has been done and that these unlawful disciplinary actions will not be cited or used against them in any way in the future.

JASON LOPEZ'S PLANET EARTH LANDSCAPE,
INC.

(Employer)

Dated _____ By _____
(Jason Lopez) (President)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want Charging Party representation and it investigates and remedies unfair labor practices by employers and Charging Parties. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 W. Olympic Boulevard, Room 700

Los Angeles, California 90064-1824

Hours: 8:15 a.m. to 4:45 p.m.

310-235-7351.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 310-235-7351.